(23)

FILED
MAY 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-380

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner.
v.

LEROY CARHART, M.D., et. al.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR AMICUS CURIAE JILL STANEK IN SUPPORT OF PETITIONER

Erik W. Stanley
Rena M. Lindevaldsen
Mary E. McAlister
David M. Corry
LIBERTY COUNSEL
100 Mountain View Rd
Suite 2775
Lynchburg, VA 24502
(434) 592-7000

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
LIBERTY COUNSEL
1055 Maitland Ctr Commons
Second Floor
Maitland, FL 32751
(800) 671-1776

Counsel for Amicus Curiae

QUESTION PRESENTED

The Partial-Birth Abortion Ban Act of 2003 (the Act), Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531), prohibits a physician from knowingly performing a "partial-birth abortion" (as defined in the statute) in or affecting interstate commerce. Section 3, 117 Stat. 1206-1207. The Act contains an exception for cases in which the abortion is necessary to preserve the life of the mother, but no corresponding exception for the health of the mother. Congress, however, made extensive factual findings, including a finding that "partial-birth abortion is never medically indicated to preserve the health of the mother." Section 2 (14)(O), 117 Stat. 1206. The question presented is:

Whether, notwithstanding Congress' determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I

THROUGH THE PBA BAN ACT, CONGRESS HAS PROPERLY RECOGNIZED THAT SCIENTIFIC EVIDENCE HAS PROVEN THAT UNBORN AND PARTIALLY BORN CHILDREN ARE UNIQUE INDIVIDUALS WHOSE FUNDAMENTAL RIGHT TO LIFE MUST BE PROTECTED. 3

II

BY ENACTING THE PBA BAN ACT, CONGRESS HAS AFFIRMED THAT THE INALIENABLE RIGHT TO LIFE BELONGS TO ALL AMERICANS, NOT MERELY TO THOSE WHOM SOME THIRD PARTY DEEMS WORTHY UNDER A VAGUE AND STANDARDLESS "HEALTH

EXCEPTION." 9

III

BY ENACTING THE PBA BAN ACT AND TWO SIMILAR STATUTES, CONGRESS HAS ACTED TO PROTECT ITS SIGNIFICANT INTEREST IN ENSURING RESPECT FOR ALL HUMAN LIFE AND ITS POTENTIAL. 16

A. Congress Has Acted To Protect Its Compelling Interest In The Life Of A Child In The Process Of Being Born. 16

B. The PBA Ban Act Is A Valid And Constitutional Part Of Congress' Concerted Effort To Protect Human Life At All Stages of Development. 22

IV

IN ENACTING THE PBA BAN ACT, CONGRESS HAS PROPERLY RECOGNIZED THAT PARTIALLY BORN CHILDREN MUST BE GIVEN AT LEAST THE SAME PROTECTIONS AGAINST TORTURE AND CRUELTY AS DO NON-HUMANS AND HUMANS CONVICTED OF CAPITAL CRIMES 26

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Botsford v. Union Pacific Railroad,
141 U.S. 250 (1891) 12, 13

Doe v. Bolton,
410 U.S. 179 (1973) 3

Fuhrman v. Georgia,
408 U.S. 238, 273 (1972) 28

Gregg v. Georgia,
428 U.S. 153, 173 (1976) 27

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 7, 19, 20

Planned Parenthood v. Farmer,
220 F.3d 127 (3d Cir.2000) 23

Roe v. Wade,
410 U.S. 113, 159 (1973) 3, 7, 14, 16, 17

Stenberg v. Carhart,
530 U.S. 914, 957 (2000) 2, 16, 17, 21, 22

Thornburgh v. American College of Obstetricians and Gynecologists,
476 U.S. 747 (1986) 18, 19

Webster v. Reproductive Health Services,
492 U.S. 490 (1989) 4, 18-19

STATE CASES

State v. Miller,
90 Kan. 230 (1913) 14

Trent v. State,
15 Ala. App. 485, 486 (1916) 13

FEDERAL STATUTES

1 U.S.C. § 8 22

7 U.S.C. § 2149 28

7 U.S.C. § 2131-2156 (1990) 28

16 U.S.C. § 668 (1994) 27

18 U.S.C. § 1841 22

Born Alive Infants Protection Act of 2001: Hearing on H.R. 2175 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 107th Cong. (2001) 2001 WL 789844 ..... 15, 20

H.R. Rep. 107-186 (2002) 23-26

H.R. Rep. 108-420 (2004) 23

H.R. Rep. 108-58 ..... 9, 10, 14, 16, 17, 29

Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 ..... i, 6, 7, 8, 15, 21, 22, 29

OTHER AUTHORITIES

A. Dean, PRINCIPLES OF MEDICAL JURISPRUDENCE 37-41, 123-31 (1854); S. Farr, ELEMENTS OF MEDICAL JURISPRUDENCE, in T. Cooper, TRACTS ON MEDICAL JURISPRUDENCE 40 (1819) 4

Brief of the American Association of Prolife Obstetricians and Gynecologists(AAPLOG) et. al. as Amici Curiae in Support of Appellants Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), 1989 WL 1127638 ..... 4, 5

Brief of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology as Amici Curiae in Support of Appelles, Roe v. Wade, 410 U.S. 113 (1973) and *Doe v. Bolton* , 410 U.S. 179 (1973), 1971 WL 128057..... 3

Brief of Louisiana and Mississippi as Amici Curiae in Support of Petitioners, Stenberg v. Carhart, 530 U.S. 914 (2000) 17

1 J. Beck, ELEMENTS OF MEDICAL JURISPRUDENCE 462-64 (11th ed. 1860) 4

Charlene Quint Kalebic, *Children, the Unprotected Minority: A Call for the Reexamination of Children's Rights in Light* Light of Stenberg v. Carhart, 15 REGENT U.L. REV. 223 (2003) 27, 28, 29

John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL 1 (1979) 13, 14

Raymond B. Marcin, *"Posterity" in the Preamble and a Positivist Pro-Life Position*, 38 AM. J. JURISPRUDENCE 273, 275 (1993) 10, 11, 12

Richard C. Mangrum, Stenberg v. Carhart: Poor Interpretivist Analysis, Unreliable Expert Testimony, and the Immorality of the Court's Invalidation of Partial-Birth Abortion Legislation, 34 Creighton L. Rev. 549, 607 (2001) 28

THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, REPORT SUBMITTED TO THE GOVERNOR AND LEGISLATURE OF SOUTH DAKOTA (2005) 4, 5, 6

Tracy Leigh Dodds, *Defending America's Children: How the Current System Gets it* Wrong, 29 Harv. J. L. & Pub. Pol'y 719, 742 (2006) 9, 27

1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 129..... 14

INTEREST OF AMICUS CURIAE[1]

Jill Stanek is a registered nurse who witnessed first hand aborted babies being born alive and then left to die when she worked in the Labor & Delivery Department at Christ Hospital in Oak Lawn, Illinois. Mrs. Stanek brought the issue of "live-birth" abortions into the public eye in 1999. Her disclosure gained the attention of Congress, which subsequently adopted the Born Alive Infants Protection Act ("Born Alive Act") in 2002. Mrs. Stanek testified before Congress in 2000 and 2001 during committee hearings on the Born Alive Act and has since become a recognized leader in the fight to protect the rights of unborn and partially born children. Mrs. Stanek was invited by President George W. Bush to attend the August 2002 signing of the Born Alive Act and the November 2003 signing of the Partial-Birth Abortion Ban Act that is the subject of this action.

As a labor and delivery nurse who has witnessed late-term abortions first hand, Mrs. Stanek is acutely aware of the need to recognize and protect the inalienable right to life for the youngest and most vulnerable citizens – unborn and partially born children. The Partial-Birth Abortion Ban Act is critical to securing and preserving those rights. Mrs. Stanek wants to ensure that this Court has the information necessary to examine the Partial-Birth Abortion Ban Act from the perspective of the partially born child.

---

[1] Jill Stanek files this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae* or her counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

By enacting the Partial-Birth Abortion Ban Act of 2003 ("the PBA Ban Act"), Congress has protected the most vulnerable of Americans from a gruesome and inhumane procedure that in any other context would be immediately recognizable as cruel and unusual punishment unbefitting a civilized society. Congress concluded that a child who has nearly completed the process of being born has attained an autonomy that affords the child the same "blessings of liberty," including the inalienable right to life, that belong to all Americans. Congress recognized that partially born children are included among the "persons" and "posterity" guaranteed fundamental rights under the Constitution, and therefore are entitled to protection against those who would infringe upon or seek to terminate their rights. Congress determined that partially born children must be given rights at least equal to convicted murderers and even animals who are protected against torture and "cruel and unusual" punishment. Congress' enactment of the PBA Ban Act complements adoption of the Born Alive Infants' Protection Act and the Unborn Victims of Violence Act (also known as Laci and Conner's Law), which acknowledge that children at various stages of development are entitled to constitutional protection. The three measures create a continuum of protection for human life consistent with Congress' significant state interest in "enacting laws to promote the life of the unborn and ensure respect for all human life and its potential." *Stenberg v. Carhart*, 530 U.S. 914, 957 (2000) (Kennedy, J. dissenting).

ARGUMENT

I

THROUGH THE PBA BAN ACT, CONGRESS HAS PROPERLY RECOGNIZED THAT SCIENTIFIC EVIDENCE HAS PROVEN THAT UNBORN AND PARTIALLY BORN CHILDREN ARE UNIQUE INDIVIDUALS WHOSE FUNDAMENTAL RIGHT TO LIFE MUST BE PROTECTED.

At the time of this Court's decision in *Roe v. Wade*, 410 U.S. 113, 159 (1973), obstetrics had "discarded as unscientific the concept that the child in the womb is but tissue of the mother. The whole thrust of medicine is in support of the notion that the child in its mother is a distinct individual in need of the most diligent study and care, an that he is also a patient whom science and medicine treats just as it does any other person."[2] In *Roe*, a majority of this Court held that there was no consensus regarding when life begins and declined to resolve the question. The *Roe* majority concluded that "the fetus, at most, represents only the potentiality of life." *Id.* at 162.

Thirty years later, scientific and medical advances have confirmed what medical science has known since the19th

---

[2] *See* Brief of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology as Amici Curiae in Support of Appelles, ("ACOG Roe Brief") *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton* , 410 U.S. 179 (1973), 1971 WL 128057.

Century – that human life begins at conception.[3]

> Over the past [twenty] years there have been extraordinary scientific, medical and technological advances and discoveries which expose the rather rudimentary level of knowledge and ignorance of science, errors of fact and judgment concerning past scientific understanding of the child's existence as a human being, the child's early development and ability to react to the child's environment and feel pain prior to birth. The new techniques developed through the exploding revolution over the past [twenty years] permits scientists to observe human existence and development at a molecular level, which is applicable in determining genetic uniqueness, genetic diseases and related information through the analysis of human genes well in advance of the old gross, anatomical observation. [4]

---

[3] Brief of the American Association of Prolife Obstetricians and Gynecologists(AAPLOG) et. al. as Amici Curiae in Support of Appellants , *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), 1989 WL 1127638 at *5 ("AAPLOG Webster Brief"), *citing* 1 J. Beck, ELEMENTS OF MEDICAL JURISPRUDENCE 462-64 (11th ed. 1860); A. Dean, PRINCIPLES OF MEDICAL JURISPRUDENCE 37-41, 123-31 (1854); S. Farr, ELEMENTS OF MEDICAL JURISPRUDENCE, in T. Cooper, TRACTS ON MEDICAL JURISPRUDENCE 40 (1819).

[4] THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, REPORT SUBMITTED TO THE GOVERNOR AND LEGISLATURE OF SOUTH DAKOTA 22 (2005), *citing* Declaration of David Fu-Chi Mark, M.D., available at

"DNA fingerprinting and the refinement of it by polymerase chain reaction (PCR) techniques developed in the mid-1990s have proven that each human being is totally unique immediately at fertilization."[5] Scientists who have developed these new technologies have concluded that "[t]here can no longer be any doubt that each human being is totally unique from the very beginning of his or her life at fertilization."[6]

> Since the time of the *Roe* Court's pronouncements about the potentiality of human life, a new medical discipline has emerged: fetology. This science treats the unborn child as a distinct patient. Indeed, the fetus is no longer dealt with as a maternal appendage ultimately to be shed at the whim of biologic forces beyond control. Instead, the fetus has achieved the status of the second patient, a patient who usually faces much greater risks of serious morbidity and mortality than does the mother. The status of the fetus has been elevated to that of a patient who should be given the same meticulous care by the physician that we long have given the pregnant woman.[7]

---

http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf.

[5] *Id.* at 25.

[6] *Id.*, *citing* Declaration of David Fu-Chi Mark, M.D.

[7] AAPLOG Brief, at *5-6, *citing* Pritchard, MacDonald, & Gant, WILLIAMS OBSTETRICS 267 (17th ed. 1985) .

Three decades of scientific and medical advancements since *Roe v. Wade* have proven that the unborn child is not merely "potential life," as the *Roe* majority believed, but "is a whole human being from the moment of fertilization, that all abortions terminate the life of a living human being, and that the unborn child is a separate human patient under the care of modern medicine."[8] Unborn children have a unique identity and, therefore, a right to life, that is wholly distinct from their mothers' and must be distinctly protected from infringement, including infringement due to a believed threat to the "health of the mother."

Nowhere is the unborn child's distinctive right to life more apparent and the need to protect it more compelling then during a "partial-birth abortion."[9] "Partial-birth abortions are 'ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb.'"[10] The "partial birth" that is part of the procedure banned by Congress "gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body."[11]

---

[8] SOUTH DAKOTA TASK FORCE REPORT at 31.

[9] Partial-Birth Abortion Ban Act of 2003, Pub.L. No. 108-105, 117 Stat. 1201, 1204-1206 (2003). Throughout this Brief, Amicus will use the term "partial-birth abortion" to refer to the procedure defined in the statute. Since that procedure is arguably not an abortion, as discussed below, Amicus will set off the phrase with quotation marks.

[10] *Id.* at 1205.

[11] *Id.*

> Based upon *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. This distinction was recognized in *Roe* when the Court noted, without comment, that the Texas parturition statute, which prohibited one from killing a child "in a state of being born and before actual birth," was not under attack. This interest becomes compelling as the child emerges from the maternal body. A child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a "person." Thus, the government has a heightened interest in protecting the life of the partially-born child.[12]

Congress recognized that the nature of "partial-birth abortion" accentuates the need for heightened protection of the right of life for the unborn child.[13] The child is in the process of being born, a process by which he attains extrauterine life, but is then killed only moments before the child fully exits the womb. In most cases, the child is alive at the beginning of the procedure and would be born alive but for the deliberate act

---

[12] *Id.*

[13] *Id.*

by the physician.[14] The process, therefore, is "disturbingly similar" to the killing of a newborn infant.[15] To permit a procedure that is so substantially similar to infanticide "promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure."[16] "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus Congress has a compelling interest in acting – indeed it must act – to prohibit this inhumane procedure."[17]

Heightened protection of the right to life for partially born children means that other interests, such as the "health of the mother" must be carefully scrutinized before being permitted to infringe upon the infant's rights. Congress engaged in such scrutiny over the course of four legislative sessions and concluded that "a partial-birth abortion is never necessary to preserve the health of a woman...."[18] Congress correctly determined that the partially born child's right to life cannot be infringed – or in this case extinguished – by an exception permitting the child to be killed to protect the "health of the

---

[14] *Id.* at 1206.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* 1203-1204.

mother."[19]

II

BY ENACTING THE PBA BAN ACT, CONGRESS HAS AFFIRMED THAT THE INALIENABLE RIGHT TO LIFE BELONGS TO ALL AMERICANS, NOT MERELY TO THOSE WHOM SOME THIRD PARTY DEEMS WORTHY UNDER A VAGUE AND STANDARDLESS "HEALTH EXCEPTION."

Congress also correctly determined that the fundamental right to life exists and is to be extended to all Americans equally, not along a sliding scale in which the strength of the right is dependant upon certain characteristics some third party deems to be relevant.[20] By adopting the PBA Ban Act,

---

[19] This is particularly true in light of testimony from physicians who said that they will certify that any pregnancy poses risks to a woman's health. H.R. REP. 108-58 at 19 (2003). "Thus, including a health exception in the ban would render the ban meaningless, as it would not prohibit a single partial-birth abortion." *Id.*

[20] *See* Tracy Leigh Dodds, *Defending America's Children: How the Current System Gets it Wrong*, 29 HARV. J. L. & PUB. POL'Y 719, 742 (2006) ("The real question in both contexts [children's rights debate and abortion debate] must be whether fundamental human rights – those of life, liberty, and the pursuit of happiness – should be recognized for all Americans, or whether those rights should exist on a continuum, dependent on certain characteristics the Court deems relevant.").

Congress affirmed that "all Americans" includes the partially born who are to be protected without regard for any characteristics they might possess or lack. Based upon testimony from physicians who said that they would affirm that all pregnancies pose a risk to women's health, Congress rightly determined that a "health exception" has a potential for abuse.[21] Such an exception would permit a third party to make value judgments that do not protect the inalienable right to life for children inches from birth, and therefore can be used to infringe upon that right.

Congress' conclusion is in keeping with the letter and spirit of the Declaration of Independence, Constitution and Bill of Rights, which identified the fundamental human rights, and early court decisions which interpreted and applied those rights.

The drafters of the Constitution made it clear that the "Blessings of Liberty" – which include the inalienable rights to life, liberty and the pursuit of happiness – belong to "yet to be born" persons as well as to those who were alive at the time that the Constitution was enacted.[22]

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common

---

[21] See, H.R. REP. 108-58 at 19 (2003).

[22] Raymond B. Marcin, *"Posterity" in the Preamble and a Positivist Pro-Life Position,* 38 AM. J. JURISPRUDENCE 273, 275 (1993).

> defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and **our Posterity**, do ordain and establish this Constitution for the United States of America.

U.S. CONST. preamble (emphasis added). From the outset, the Founders emphasized that the Constitution was meant to secure, not curtail, the "Blessings of Liberty," and that these blessings belonged to the future generations.[23] "The 'Blessings of Liberty' clause was to serve as an operative buffer preventing the Constitution from being interpreted in such a way as to affect adversely any basic rights of humankind ...."[24] The term "posterity" first appeared in the Virginia Declaration of Rights, which antedated the Declaration of Independence by one month, and informed and influenced the drafters of the Constitution.[25]The language in the Virginia Declaration particularly points to an understanding that the rights being enunciated are to be extended to and protected for future generations:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property,

---

[23] *Id.* at 288.

[24] *Id.*

[25] *Id.* at 290.

> and pursuing and containing happiness and safety.[26]
>
> According to the Virginia Declaration, rights to the enjoyment of life and liberty cannot be ceded to society, nor can persons cede those rights on behalf of their posterity. The rights to life and liberty, are, in the words of the Declaration of Independence, "unalienable." The meaning is the same. They cannot be alienated or conveyed away to the state or to anyone else, and this inalienability applies not only to our own basic rights, but also to those of our posterity.[27]

The same is true under the Constitution. Future generations, *i.e.*, the unborn, have the same fundamental right to life as do the fully born. As is true with the fully born, the unborn child's right to life cannot be alienated to the state nor even to his mother. This is even more true in the case of the partially born child who is merely inches from birth and in no way can be considered merely an appendage to his mother. **The constitutional right to life cannot hinge on a difference in location of mere inches.**

That the fundamental right to life is intended to apply to unborn and partially born as well as fully born people is apparent in early decisions by this Court and numerous state courts. For example in *Botsford v. Union Pacific Railroad*, 141 U.S. 250, 251 (1891), this Court said that "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the

---

[26] *Id.*

[27] *Id.* at 290-291.

possession and control of his own person, free from all restraint or interference of others," but even that right must yield to the right to life of an unborn child. The *Botsford* court found that the doctrine of "the writ *de ventre inspiciendo,* to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother." *Id.* at 253. A woman convicted of a capital crime could have her right to be free from involuntary medical examination infringed upon in order to prevent the death of her unborn child during implementation of the death penalty.[28] In other words, this Court "not only acknowledged a right to life in the fetus, but also recognized precedence of this right over the common law right of privacy."[29]

Similarly, throughout the 19th and early 20th centuries state courts expressly held that unborn children had a fundamental right to life that entitled them to protection in the form of prohibitions against abortion. For example, in *Trent v. State*, 15 Ala. App. 485, 486 (1916), the Alabama Court of Appeals said:

> We are forced to concede that when in the red-hot furnace of vitality two germs, male and female are brought together, that fuse themselves into one, a new being, crowned with humanity and mentality, comes

---

[28] John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL 1, 19 (1979).

[29] *Id.*

> into life. If this be true does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?

Similarly, in *State v. Miller*, 90 Kan. 230 (1913), the Kansas Supreme Court said that the statute banning abortion was meant to protect the life of the pregnant woman and unborn child. In addition, Blackstone's earliest commentaries on the law provided that "Life is ... a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[30]

Consequently, "there is substantial historical support for the notion" that "the unborn human being, as an individual living human being is a person under the Constitution" endowed with the fundamental rights to life, liberty and property and the right to seek protection of those rights.[31]

The *Roe* majority said that an unborn child fully *in utero* did not qualify as a "person" under the Constitution. *Roe v. Wade*, 410 U.S.113,158 (1973). Nevertheless, Congress was justified in finding that a partially born child could attain "personhood" and the concomitant right to life protected by the Constitution. In the procedure banned by the PBA Ban Act, the woman is no longer carrying an early-term "embryo" or "fetus" that the *Roe* majority regarded as merely "potential human life." *See id.* at 159 (offering the majority's view on the status of the unborn child). Instead, the mother has delivered all but a few inches of a late-term baby who in most

---

[30] *Id.* at 17, *citing* 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 129.

[31] Gorby at 4.

cases is capable of surviving outside of the womb. The "partial-birth abortion" procedure banned in the PBA Ban Act is performed from around 20 weeks to full term.[32] Mrs. Stanek testified that when she worked as a labor and delivery nurse she observed abortions being performed at the same stage of pregnancy – *i.e.*, 20 weeks to full-term. [33] In some cases, the babies were alive when they were delivered and lived for hours following delivery even without any medical care.[34] Those infants were at the same stage of prenatal life as are the infants who are partially delivered and then killed during the "partial-birth abortion" process that is the subject of the PBA Ban Act. Congress justifiably concluded that permitting the deliberate killing of these children so close to birth "blurs the line between abortion and infanticide"and makes it increasingly difficult to protect such life.[35] Congress rightly determined that being a few inches from birth cannot justify denying a child "personhood" and the inalienable right to life guaranteed under the Constitution. Congress protected that right to life through the PBA Ban Act.

---

[32] H.R. REP. 108-58, at 4 (2003).

[33] *Born Alive Infants Protection Act of 2001: Hearing on H.R. 2175 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Jill L. Stanek, R.N.) 2001 WL 789844 ("Stanek Testimony").

[34] *Id.*

[35] *Partial-Birth Abortion Ban Act*, 117 Stat. at 1206.

III

BY ENACTING THE PBA BAN ACT AND TWO SIMILAR STATUTES, CONGRESS HAS ACTED TO PROTECT ITS SIGNIFICANT INTEREST IN ENSURING RESPECT FOR ALL HUMAN LIFE AND ITS POTENTIAL.

A. Congress Has Acted To Protect Its Compelling Interest In The Life Of A Child In The Process Of Being Born.

Congress' conclusion that it has a compelling interest in protecting partially born children from the "partial-birth abortion" procedure is consistent with this Court's holdings regarding the State's interest in protecting the rights of the unborn. In *Roe v. Wade,* and decisions since then, this Court has affirmed that "the political processes of the state are not to be foreclosed from enacting laws to promote the life of the unborn and ensure respect for all human life and its potential." *Stenberg v. Carhart*, 530 U.S. 914, 956-957 (2000) (Kennedy, J., dissenting). By enacting the PBA Ban Act Congress has exercised its "critical and legitimate role in legislating on the subject of abortion" in a way that protects the rights of the child as well as the mother. *See id.* Because the interest is particularly compelling in the case of children who are merely inches from birth, Congress justifiably determined that a health exception should not be included. As testimony by physicians affirmed, any such health exception would be so broadly applied that it would soon swallow the rule.[36]

---

[36] *See* H.R. REP. 108-58 at 19 (2003)

In *Roe v. Wade*, 410 U.S. 113, 162 (1973), this Court recognized that "the state has an important and legitimate interest in preserving and protecting the health of the pregnant woman and a **separate and distinct interest in protecting the potentiality of human life**."(emphasis added)."Each interest grows in substantiality as the woman approaches term and at a point during pregnancy each becomes 'compelling.'"*Id.* at 163. "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." *Id.* The "partial-birth abortion" procedure banned by Congress in the PBA Ban Act is effective only when the unborn child is near or at viability. *See Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting) (Discussing the same procedure banned by the Nebraska partial-birth abortion ban); H.R. REP. 108-58 at 4 ("The partial-birth abortion procedure is performed from around 20 weeks to full term."). Therefore, Congress' interest in protecting the life of the child is compelling, or nearly so, and Congress was justified in acting to ban "partial-birth abortion."

This is particularly true in light of the fact that the Texas parturition statute, which prohibits the killing of a child "in a state of being born and before actual birth" was not challenged and therefore not invalidated by *Roe*. *See* 410 U.S. at 118. In fact, during re-argument of the *Roe* case, Justice Thurgood Marshall stated that the offense of killing a child in the process of childbirth, immediately before childbirth or "in proximity" of the child being born – the subject of the parturition statute – is not an abortion.[37] Similarly, the

---

[37] *See, Brief of Louisiana and Mississippi as Amici Curiae in Support of Petitioners, Stenberg v. Carhart*, 530 U.S. 914 (2000), Appendix A at 3.

procedure banned by Congress – the deliberate killing of a child in the process of being born – is not an abortion procedure affected by *Roe* and should not be invalidated based upon its principles. However, even if the PBA Ban Act is analyzed under *Roe*, as seen above, it is valid as a justifiable exercise of Congress' compelling interest in protecting the right to life of children at or approaching "viability."

As this Court confirmed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), "In *Roe v. Wade*, the Court recognized that the State has 'important and legitimate' interests in protecting maternal health and in the potentiality of human life." *Id.* at 516. The *Webster* Court upheld, *inter alia*, a provision of Missouri's abortion regulations which required that physicians perform tests to ascertain whether a fetus is viable if the physician had reason to believe that the woman might be 20 or more weeks pregnant. *Id.* at 520. The viability-testing provision was concerned with promoting the State's interest in "potential human life rather than in maternal health" and created essentially a presumption of viability at 20 weeks. *Id.* The District Court had invalidated the provision based upon the trimester framework of *Roe*, but this Court overturned that decision on the grounds that the trimester framework was too rigid and that the State's interest should not be impaired by such an inflexible standard. *Id.* at 518-520.

> [W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. The dissenters in *Thornburgh [v. American College of*

> *Obstetricians and Gynecologists*, 476 U.S. 747 (1986)], writing in the context of the *Roe* trimester analysis, would have recognized this fact by positing against the 'fundamental right' recognized in *Roe* the State's 'compelling interest' in protecting potential human life throughout pregnancy. "[T]he State's interest if compelling after viability is equally compelling before viability." *Thornburgh*, 476 U.S. at 795 (White, J., dissenting).

Webster, 492 U.S.at 519. The *Webster* court agreed with the dissenters in *Thornburgh* that the *Roe* decision should not be used to eliminate the state's compelling interest. The *Webster* court found that Missouri's requirement of a viability test "permissibly furthers the State's interest in protecting potential human life," and "is reasonably designed **to ensure that abortions are not performed where the fetus is viable – an end which all concede is legitimate** – and that is sufficient to sustain its constitutionality." *Id.* at 520 (emphasis added). Similarly, Congress' ban on the killing of an infant in the process of being born is designed to ensure that a viable child is not aborted and therefore furthers Congress' interest in protecting human life. "*Roe v. Wade* 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.'" *Id.* at 506. Missouri's preamble stating that "the life of each human being begins at conception, and that 'unborn children have protectable interests in life, health and well-being' is an acceptable expression of such a value judgment."*Id.* Likewise, Congress' determination that an infant who is merely inches away from being fully born should be born instead of being killed is an acceptable expression of Congress' value judgment favoring birth over abortion.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 876 (1992), this Court affirmed and emphasized that portion of *Roe* which held that there is a "substantial state interest in potential life throughout pregnancy." The *Casey* Court rejected *Roe*'s trimester framework in large part because "it undervalues the State's interest in the potential life within the woman." *Id.* at 875. The *Casey* Court confirmed that *Roe*'s established right to terminate a pregnancy is "not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted." *Id.* The *Casey* Court concluded that the "later point" should be viability, which it defined as "The time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." *Id.* at 870. Justice Blackmun, the author of the majority opinion in *Roe*, clarified that as an unborn child "evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling." *Id.* at 933 (Blackmun, J., concurring in part and dissenting in part).

In the procedure banned by Congress, the unborn child is only inches from complete independence from the uterine environment and has attained its "postnatal form." Some infants born at the 20 week-plus time frame addressed in the PBA Ban Act survive even without medical intervention.[38]

---

[38] *See Stanek Testimony*, 2001 WL 789844

Therefore, Congress rightly concluded that its interest in protecting the partially born child's right to life and fostering a regard for human life was compelling and justified adoption of the PBA Ban Act.

The PBA Ban Act directly addresses the State's "important constitutional role in defining their interests in the abortion debate." *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting). The PBA Ban Act reflects Congress' legitimate interests in protecting the life of the unborn and partially born, preserving the integrity of the medical profession and erecting a barrier to infanticide.[39] As Justice Kennedy stated, these are precisely the type of State interests that *Casey* upheld as legitimate. *See Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting). Justice Kennedy's conclusions regarding Nebraska's partial-birth abortion ban are equally apropos to Congress' PBA Ban Act:

> Through their law the people of Nebraska were forthright in confronting an issue of immense moral consequence. The state chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life, while the State still protected the woman's autonomous right of choice as reaffirmed in *Casey*.

Id. at 979. As was true with the Nebraska Legislature, Congress approached the issue of "partial-birth abortion" from the perspective "of a society shocked when confronted with a new method of ending human life." *See id.* at 957. "The gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant

---

[39] *See* Partial-Birth Abortion Ban Act, 117 Stat. at 1206.

human life that can only be countered by a prohibition of the procedure."[40] Most importantly, Congress approached the issue of "partial-birth abortion" from the perspective of the partially-born child and Congress' responsibility to respect, preserve and protect that child's inalienable right to life.

B. The PBA Ban Act Is A Valid And Constitutional Part Of Congress' Concerted Effort To Protect Human Life At All Stages of Development.

The PBA Ban Act is one part of a comprehensive program by Congress to fulfill its obligation to preserve and protect the right to life for children at all stages of development. Congress has exercised its responsibility "to promote the life of the unborn and ensure respect for all human life and its potential," *see Stenberg v. Carhart*, 530 U.S. at 956-957 (Kennedy, J., dissenting), by enacting statutes aimed at protecting the right to life for unborn, partially born and newly born children. As one of those statutes, the PBA Ban Act represents the mid-point of a statutory continuum of protection of the fundamental right to life for the youngest Americans. At either end of the continuum are the Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841, also known as "Laci and Connor's Law," and the Born-Alive Infants Protection Act of 2001, 1 U.S.C. § 8 (the "Born Alive Act").

"Laci and Connor's Law," named in recognition of murder victims Laci Peterson and her unborn child, Connor, was adopted "to ensure that Federal prosecutors are able to punish those who injure or kill unborn children during the commission of violent Federal crimes, whether or not the

---

[40] *Id.*

child is fortunate enough to survive the attack and be born alive."[41] The law is part of a "growing trend in American jurisdictions of recognizing greater legal protections for unborn children, a trend consistent with the advancements in medical knowledge and technology" that have "greatly enhanced our understanding of the development of unborn children."[42] Congress specifically referenced this Court's holdings in *Webster* and *Roe* and stated that it was exercising its responsibility to protect unborn life within the parameters set in those decisions.[43] Congress concluded that"[b]y recognizing the unique harms done to women and unborn children, and by mending the insufficiencies of current Federal law, H.R. 1997 [Laci's and Conner's Law] serves vital national interests by extending the criminal law's protections to all human life."[44]

Those protections were expressly extended to newly born infants in the Born Alive Act. Congress noted that "[i]t has long been an accepted legal principle that infants who are born alive, at any stage of development are persons who are entitled to the protections of the law."[45] However, this Court's opinion in *Stenberg* and the Third Circuit's opinion in *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir.2000) that a child's status under the law is dependent upon whether

---

[41] H.R. REP. 108-420, at 6 (2004).

[42] *Id.* at 5-6.

[43] *Id.* at 18.

[44] *Id.* at 21.

[45] H.R. REP. 107-186 at 1-2 (2002).

the mother intends to abort or give birth led Congress to believe that it was necessary to re-establish a newly born child's right to life.[46] Echoing some of the concerns raised by Justice Kennedy in his dissent in *Stenberg*, Congress said:

> The logical implications of *Carhart* and *Farmer* are both obvious and disturbing. Under the logic of these decisions, once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would not have any rights under the law – no right to receive medical care, to be sustained in life, or to receive any care at all.[47]

As Mrs. Stanek and others testified, those implications were becoming reality in many circumstances.[48] Congress predicted what the next logical step would be:

> [I]f a child who survives an abortion and is born alive would have no claim to the protections of the law,

---

[46] *Id.* at 2.

[47] *Id.*

[48] *Id.* at 8-9 (2002). Mrs. Stanek and Allison Baker "testified before the Subcommittee on the Constitution that physicians at Christ Hospital have performed numerous 'induced labor' or 'live-birth' abortions, a procedure in which physicians use drugs to induce premature labor and deliver unborn children, many of whom are sometimes still alive, and then simply allow those who are born alive to die."

> there would, then, be no basis upon which the government may prohibit an abortionist from completely delivering an infant before killing it or allowing it to die. The "right to abortion," under this logic, means nothing less than the right to a dead baby, no matter where the killing takes place.[49]

Congress concluded that it needed to enact a law to protect the life of the newly born infant and thereby halt the progression toward legalized infanticide and ensure respect for all human life. The result was the Born Alive Act, which was enacted:

> (1) to repudiate the flawed notion that a child's entitlement to the protections of the law is dependent upon whether that child's mother or others want him or her;
> (2) to repudiate the flawed notion that the right to an abortion means the right to a dead baby, regardless of where the killing takes place;
> (3) to affirm that every child who is born alive – whether as a result of induced abortion, natural labor, or caesarean section – bears an intrinsic dignity as a human being which is not dependent upon the desires, interests or convenience of any other person, and is entitled to receive the full protections of the law and
> (4) to establish firmly that, for purposes of Federal law, the term "person" includes an infant who is completely expelled or extracted from his or her mother and who is alive, regardless of whether or not the baby's development is believed to be, or is in fact,

---

[49] *Id.* at 2.

> sufficient to permit long-term survival, and regardless of whether the baby survived an abortion.[50]

Having re-established the right to life for the newly born in the Born Alive Act, Congress properly concluded that the right must be extended to those just inches from birth. The PBA Ban Act is an integral part of Congress' thoughtful and thorough plan to protect the right to life for "our posterity." Congress' conclusion that a health exception should not be permitted to swallow the ban was a further reflection of that plan.

IV

IN ENACTING THE PBA BAN ACT, CONGRESS HAS PROPERLY RECOGNIZED THAT PARTIALLY BORN CHILDREN MUST BE GIVEN AT LEAST THE SAME PROTECTIONS AGAINST TORTURE AND CRUELTY AS DO NON-HUMANS AND HUMANS CONVICTED OF CAPITAL CRIMES.

The most tragic consequence of "partial-birth abortion" is that it imposes on a partially born human being a death penalty that would be branded unconstitutional cruel and unusual punishment if imposed upon a convicted murderer. Partially born children subjected to the "partial-birth abortion" procedure are not even given the same protection against cruel and unusual punishment as are animals.

> Unborn children are thus in a uniquely unprotected position. Most other living beings in our society, from rabid animals to serial murderers are protected from

---

[50] *Id.* at 3.

> this manner of death by torture or cruelty laws. For example, drawing and quartering, a method of execution eerily similar to D&E abortions, was banned over a century ago as inhumane for a civilized society to inflict on criminals. Because unborn children do not have lives recognizable in a court of law, however, they are not granted Eighth Amendment or any other protections against cruel and unusual treatment.[51]

As Justice Stevens said in *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), "the 'dignity of man is the basic concept underlying the Eighth Amendment.'" With the notable exception of unborn and partially born children, every member of American society is protected from torture and barbaric forms of execution.[52] Even the most heinous of criminals sentenced to death cannot be subjected to the procedure banned under the PBA Ban Act – the puncturing of their skulls followed by the evacuation of their brains.

"Indeed, even animals are protected from this type of treatment through animal cruelty laws."[53] For example, destruction of a bald eagle egg bears a fine of $5,000 and up to one year in prison for a first conviction, and fines of up to $10,000 per offense and up to two years in prison for each

---

[51] Dodds, *Defending America's Children*, at 725-726.

[52] Charlene Quint Kalebic, *Children, the Unprotected Minority: A Call for the Reexamination of Children's Rights in Light of* Stenberg v. Carhart, 15 REGENT U.L. REV. 223, 247-248 (2003)

[53] *Id.*

subsequent conviction. 16 U.S.C. § 668 (1994). Under the Animal Welfare Act (7 U.S.C. § 2131-2156 (1990)), animal breeders, dealers or researchers are subject to civil penalties if they subject animals to cruel and unusual punishment, including failure to "minimize pain." 7 U.S.C. § 2149. "Thus, it is clear that this type of torture and killing of any living being, including animals, is seen as reprehensible and unjustified in civilized society." [54]

> We impose capital punishment only after a jury conviction for a heinous crime; only after a separate trial to determine whether the death penalty should be imposed; normally also only after prolonged habeas corpus hearings to ensure that the person subject to the death penalty truly is sufficiently culpable as determined by a fair trial and sentencing. Even then we preserve the dignity of the condemned by prohibiting cruel and unusual punishment. We prohibit methods of killing that are barbarous, undignified or inflict 'unnecessary' pain. **Applied to the partial-birth abortion issue, why should we care so much when we impose capital punishment upon a person whom the state has deemed worthy of death, while caring so little when we condone death of the innocent?** [55]

---

[54] Quint Kalebic at 247-248.

[55] Richard C. Mangrum, *Stenberg v. Carhart: Poor Interpretivist Analysis, Unreliable Expert Testimony, and the Immorality of the Court's Invalidation of Partial-Birth Abortion Legislation*, 34 CREIGHTON L. REV. 549, 607 (2001) (emphasis added).

The PBA Ban Act is Congress' response to that question. As Justice Brennan said in *Fuhrman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring), the fundamental premise of the Eighth Amendment is "that even the vilest criminal remains a human being possessed of common human dignity."Consequently, methods of punishment regarded as "barbaric" have been banned even for those convicted of committing similar acts against others. For example, "[i]n medieval times, the hardest of criminals were subjected to the punishment of being 'drawn and quartered,' consisting of literally pulling the unfortunate individual apart limb from limb. Long ago, this medieval form of torture was banned because it was considered inhumane in a civilized society."[56]

Similarly, Congress has found that the "partial-birth abortion" procedure "is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[57] "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life."[58] Congress further found that including a health exception, which physician witnesses testified could be used to justify a procedure on any pregnant woman[59], would render the PBA Act essentially meaningless and defeat the purpose

---

[56] Quint Kalebic at 247-248.

[57] 117 Stat. at 1201.

[58] *Id.* at 1206.

[59] H.R. REP. 108-58 at 19 (2003)

of protecting innocent human life.

Congress properly concluded that if a convicted murderer cannot be put to death in a barbaric and inhumane manner at the hands of the state, then a partially born child cannot be put to death in a barbaric and inhumane manner at the hands of his mother and her physician. No claim of adverse health consequences on the part of the mother, nor any other purported mitigating factor, can change that conclusion.

CONCLUSION

Congress acted properly in enacting the PBA Ban Act without a so-called "health exception." The PBA Ban Act comports with the Constitution and this Court's precedents. For these reasons, the Eighth Circuit's decision invalidating the Act must be reversed.

Erik W. Stanley
Rena M. Lindevaldsen
Mary E. McAlister
David M. Corry
LIBERTY COUNSEL
100 Mountain View Rd
Suite 2775
Lynchburg, VA 24502
(434) 592-7000

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
LIBERTY COUNSEL
1055 Maitland Ctr Commons
Second Floor
Maitland, FL 32751
(800) 671-1776

Counsel for Amicus Curiae